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18 DEC 1969

MEMORANDUM FOR: Director of Security

SUBJECT : Foreign Divorce Decrees

25X1A

As a result of problems generated by the [redacted] marriage to alien case (Mexican divorce), I have been directed by Colonel White to "please take such steps as you deem appropriate in future cases in which a divorce is involved to satisfy yourself that the divorce is valid." To assist me in this, I would appreciate hereafter any additional information you may develop during your investigation concerning a foreign divorce obtained by an employee or his intended foreign national spouse.

25X1A The [redacted] case surfaced a potential problem that may be equally as "sticky" as the security problems inherent in these cases, namely, which survivors, in the event of the death of our employee, receive death benefits, etc. Also, there is a concern on our part about who is eligible for medical benefits.

In order that I can properly monitor this situation, I would appreciate your letting me know any time you discover that an Agency employee, staff or contract, or his spouse has obtained a foreign divorce. We will then look into the situation and make every effort to assist them in resolving possible problems before a serious situation arises.

/s/ Robert S. Wattles

Robert S. Wattles
Director of Personnel

Distribution:
O&1 - Addressee
1 - OGC
1 - DD/Pers/SP
1 - D/Pers Subject File
1 - D/Pers Chrono
25X1A OD/Pers [redacted]:rgw (18 Dec 69)
1 - DDS
1 - Ex Dir Comp

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GROUP 1
Excluded from automatic downgrading and

STATINTL

The case cited by [redacted] (1949):

U.S. Court of Appeals, D.C. 16 Nov. 49 (179 Fed. 2d 466) vacated judgment + remanded to Dist. Ct. w/ direction to dismiss complaint as abated because of failure to substitute Buck's successor in office w/in 6 months.

Supreme Court 95 L.Ed 15 18 Oct. 50 – affirmed Appelate Court

SNYDER v. BUCK.

Civ. A. No. 1225-47.

District Court of the United States for the District of Columbia.

Jan. 23, 1948.

1. **Administrative law and procedure** ⇐104
Army and navy ⇐50

The Navy Department is not exempted from provisions of the Administrative Procedure Act except in respect to naval authority exercised in the field in time of war or in occupied territory, and in respect to courts-martial, and all other activities of the Navy Department, including the making of payments to widow of an officer or an enlisted man, are within scope of act. Administrative Procedure Act of 1946, §§ 1 et seq., 2(a), 10(a–c), 5 U.S.C.A. §§ 1001 et seq., 1001(a), 1009(a–c); 34 U.S.C.A. § 943.

2. **Administrative law and procedure** ⇐654

A statute precluding judicial review may be one which expressly provides that any administrative action taken thereunder may not re-examined and set aside by the courts or may be one which without expressly so asserting clearly indicates that action of administrative agency is to be deemed final and conclusive for all purposes. Administrative Procedure Act of 1946, § 10(a–c), 5 U.S.C.A. § 1009(a–c).

3. **Administrative law and procedure** ⇐701
Army and navy ⇐50

Under doctrine of "expressio unius est exclusio alterius," provision in statute for payment of six months' salary to widow of deceased member of Navy that determination by Secretary of Navy that there is no widow shall be final and conclusive upon accounting officers of the government means that determination of the Secretary shall be final and conclusive on Comptroller General but on no one else, and hence statute does not preclude judicial review. 34 U.S.C.A. § 943; Administrative Procedure Act of 1946, § 10(a–c), 5 U.S.C.A. § 1009(a–c).

See Words and Phrases, Permanent Edition, for all other definitions of "Expressio Unius Est Exclusio Alterius".

4. **Administrative law and procedure** ⇐701

"Agency action" within provision of Administrative Procedure Act for judicial review except so far as "agency action" is by law committed to agency discretion includes making of contracts, making of loans by lending agencies of the government, issuance of passports and visas by Department of State, issuance of visitors' permits by Immigration and Naturalization Service and other matters in which agency is permitted by law to reach a conclusion on basis of its own discretion. Administrative Procedure Act of 1946, § 10(a–c), 5 U.S.C.A. § 1009(a–c).

See Words and Phrases, Permanent Edition, for all other definitions of "Agency Action".

5. **Administrative law and procedure** ⇐701
Army and navy ⇐50

The statute providing for payment of six months' salary to widow of deceased member of Navy does not call for exercise of administrative discretion but creates legal duty on part of Paymaster General to pay prescribed allowance, and hence determination by Secretary of the Navy that there is no widow is not an "agency action" within provision of the Administrative Procedure Act for judicial review except so far as "agency action" is by law committed to agency discretion. Administrative Procedure Act of 1946, § 10(a–c), 5 U.S.C.A. § 1009(a–c); 34 U.S.C.A. § 943.

6. **Administrative law and procedure** ⇐66[illegible]

Provision in Administrative Procedure Act conferring right to secure judicial review on any person adversely affected or aggrieved by any agency action within meaning of any relevant statute excludes from right of judicial review all governmental action affecting the public generally, but not impinging on the legal rights of any individual, and permits an appeal to the courts by any person whose individual legal rights are adversely affected. Administrative Procedure Act of 1946, § 10(a), 5 U.S.C.A. § 1009(a).

7. **Administrative law and procedure** ⇐66[illegible]
Army and navy ⇐50

Alleged widow of Navy officer denied payment of statutory allowance by Paymaster General was "aggrieved" within provision of Administrative Procedure Act permitting judicial review. Administrative

Procedure Act of 1946, § 10(a), 5 U.S.C.A. § 1009(a); 34 U.S.C.A. § 943.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved".

8. Administrative law and procedure ⇐701

Under Administrative Procedure Act, every final agency action is subject to judicial review at behest of any person whose legal rights are adversely affected, unless the action is taken under a statute precluding judicial review, or unless the agency action is by law committed to agency discretion. Administrative Procedure Act of 1946, § 10(c), 5 U.S.C.A. § 1009(c).

9. Administrative law and procedure ⇐657

Under provision in Administrative Procedure Act for judicial review, an adequate specified statutory review proceeding in respect to any specified agency action should be pursued, if such is provided, but in absence or inadequacy of any such proceeding, recourse may be had to any "applicable" form of legal action; by "applicable" being meant "appropriate or suitable." Administrative Procedure Act of 1946, § 10(b), 5 U.S.C.A. § 1009(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Applicable".

10. Administrative law and procedure ⇐701

The Administrative Procedure Act subjects to judicial review a large group of administrative actions which previously could not have been re-examined or set aside by the courts, including numerous determinations of private rights in respect to which a writ of mandamus did not lie because they involved functions which were not purely ministerial, but the diversified activities of executive and administrative agencies that are committed to their discretion or that do not impinge on private rights remain unaffected. Administrative Procedure Act of 1946, § 10(a–c), 5 U.S.C.A. § 1009(a–c).

11. Administrative law and procedure ⇐701
Army and navy ⇐50

Determination by Paymaster General of the Navy that alleged widow of Navy officer was not entitled to statutory allowance on ground that marriage to officer was invalid was subject to judicial review under the Administrative Procedure Act. Administrative Procedure Act of 1946, § 10(a–c), 5 U.S.C.A. § 1009(a–c); 34 U.S.C.A. § 943.

12. Administrative law and procedure ⇐679

Under provision of Administrative Procedure Act authorizing reviewing court to decide all relevant questions of law and to set aside agency action found not to be in accordance with law, where facts were stipulated, only question for court was whether agency had correctly applied law to the facts. Administrative Procedure Act of 1946, § 10(e), 5 U.S.C.A. § 1009(e).

13. Courts ⇐359

Place where marriage is celebrated governs validity of marriage even if parties are domiciled in state different from that in which marriage is celebrated, except in cases of incestuous and polygamous marriages which are abhorrent to general standards of morality, and hence validity of marriage of New Jersey residents in Maryland was determinable by Maryland law.

14. Marriage ⇐54

Under Maryland law, a marriage contracted by a person who is not free to marry is voidable, and may be annulled only by decree of a court rendered in action brought by one of the parties to the marriage. Code Md.1939, art. 62, § 16.

15. Army and navy ⇐50
Marriage ⇐54

Under Maryland law, where no action to annul marriage had been brought by either party during husband's lifetime, marriage was not subject to attack collaterally on ground that prior marriage of wife had not been dissolved by divorce obtained in Mexico, and hence wife was entitled as widow to allowance provided by statute in amount equal to six months' pay at rate received by her husband as an officer in the Navy at time of his death. 34 U.S.C.A. § 943; Code Md.1939, art. 62, § 16.

16. Administrative law and procedure ⇐236
Army and navy ⇐50

An adjudication that a marriage is invalid may ordinarily be made only by a

court of competent jurisdiction after trial at which all interested parties have an opportunity to be heard, and it is questionable whether an administrative agency, such as the Veterans' Administration, the Navy Department, or the War Department, has any authority to hold a marriage invalid in an ex parte manner on basis of its own investigation.

17. Army and navy ⇐50

The statute requiring payment of widow's allowance to be made immediately upon official notification of the death of any officer or enlisted man of the Navy does not vest in Navy Department any authority to make exhaustive administrative investigations for purpose of passing on validity of a marriage apparently valid on its face. 34 U.S.C.A. § 943.

18. Administrative law and procedure ⇐657
Federal civil procedure ⇐2395
Mandamus ⇐105

Mandamus to compel payment of widow's allowance by Paymaster General of Navy was inappropriate remedy in view of fact that act to be performed was not purely ministerial, but widow was entitled under Federal rule to whatever judgment evidence warranted, irrespective of whether it was precise relief prayed for in complaint, and hence under provision of Administrative Procedure Act that any applicable form of relief might be granted, judgment in favor of widow would be given form of a mandatory injunction directing necessary payment, though complaint prayed for relief in nature of mandamus. Federal Rules of Civil Procedure, rule 54(c), 28 U.S.C.A. following section 723c; 34 U.S.C.A. § 943; Administrative Procedure Act of 1946, § 10(b), 5 U.S.C.A. § 1009(b).

19. Army and navy ⇐50

In action for payment of widow's allowance in amount equal to six months' pay at rate received by deceased husband at date of his death as an officer of the Navy, Secretary of the Navy was not an indispensable party and it was sufficient that Paymaster General of the Navy was sole defendant. 34 U.S.C.A. § 943.

Action by Madeline Ursula Snyder against Rear Admiral W. A. Buck, Paymaster General of the Navy, for mandamus requiring the defendant to pay to plaintiff an amount equal to six months' pay at the rate being received by plaintiff's deceased husband as an officer of the United States Navy at date of his death.

Judgment for plaintiff.

John Geyer Tausig, of Washington, D. C., for plaintiff.

George Morris Fay, U. S. Atty., D. Vance Swann and William C. Brewer, all of Washington, D. C., for defendant.

HOLTZOFF, Associate Justice.

This is an action by the widow of a Naval officer for relief in the nature of a mandamus to direct the Paymaster General of the Navy to pay her an amount equal to six months' pay of the deceased at the rate received by him at the time of his death.

The pertinent statute provides that upon the death, from wounds or disease, of any officer or enlisted man on the active list of the regular Navy or regular Marine Corps, the Paymaster General of the Navy shall cause to be paid to the widow an amount equal to six months' pay at the rate received by the deceased at the time of his death. If there be no widow, the payment is to be made to his child or children, and if there be no widow or child, then to any other dependent relative of the deceased previously designated by him.[1] The plaintiff and the deceased were marr
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[1] The pertinent provisions of the statute, 58 Stat. 129, U.S.C.A., title 34, § 943, read as follows: "Immediately upon official notification of the death from wounds or disease, not the result of his or her own misconduct, of any officer, enlisted man, or nurse on the active list of the Regular Navy or Regular Marine Corps, or on the retired list when on active duty, the Paymaster General of the Navy shall cause to be paid to the widow, and if there be no widow, to the child or children, and if there be no widow or child, to any other dependent relative of such officer, enlisted man, or nurse previously designated by him or her, an amount equal to six months' pay at the rate received by such officer
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deceased were married on July 3, 1945, at Elkton, Maryland, and lived together as man and wife until the husband's death on March 10, 1946. The Paymaster General of the Navy declined to pay the statutory allowance to the plaintiff, on the alleged ground that her marriage to the deceased was invalid. The basis for this conclusion was that the plaintiff had been previously married; that the prior marriage ended in a divorce obtained in Mexico, although neither of the parties to the marriage was a resident of that country at the time when the divorce was granted; that this divorce was ineffective; and that, therefore, the plaintiff was not free to contract the second marriage. As the deceased left no children, the Navy Department paid the allowance to his sister.

The first question to be determined is whether the ruling of the Navy Department is subject to judicial review. It may be assumed, without deciding, that prior to the enactment of the Administrative Procedure Act of June 11, 1946, 5 U.S.C.A. § 1001 et seq., the action of the Navy Department would have been final and conclusive, and could not have been re-examined by the courts. A long, unbroken line of authorities upholds the doctrine that a writ of mandamus may not be granted to compel the performance of a duty on the part of a public officer involving the determination of questions of law or fact, as this remedy is limited to ministerial acts, Brunswick v. Elliott, 70 App.D.C. 45, 103 F.2d 746; Southern Transp. Co. v. Interstate Commerce Comm., 61 App.D.C. 284, 61 F.2d 925.[2] The question arises, however, whether the Administrative procedure Act, Act of June 11, 1946, U.S.C.A., Title 5, Secs. 1001–1011, has changed the law in this respect. We, therefore, proceed to an analysis of this statute.

[1] Section 2(a) of the Act defines the extent of the statute. It in effect provides that the Act applies to each authority of the Government of the United States, except the Congress, the Courts, the territorial governments, and the District of Columbia. For certain purposes, it also excepts courts-martial and military commissions as well as military or naval authority exercised in the field in time of war, or in occupied territory. It also excludes functions performed under the Selective Training and Service Act of 1940, 50 U.S.C.A.Appendix, § 301 et seq., the Contract Settlement Act of 1944, 41 U.S.C.A. § 101 et seq., and the Surplus Property Act of 1944, 50 U.S.C.A. Appendix, § 1611 et seq.[3] The Navy De-

enlisted man, or nurse at the date of his or her death. The Secretary of the Navy shall establish regulations requiring each officer and enlisted man or nurse having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his or her death. Said amount shall be paid from funds appropriated for the pay of the Navy and pay of the Marine Corps, respectively: *Provided*, That if there be no widow, child, or previously designated dependent relative, the Secretary of the Navy shall cause the amount herein provided to be paid to any grandchild, parent, brother or sister, or grandparent shown to have been dependent upon such officer, enlisted man, or nurse prior to his or her death, *and the determination of such fact by the Secretary of the Navy shall be final and conclusive upon the accounting officers of the Government* * * *." (Emphasis supplied.)

[2] See also Silberschein v. United States, 266 U.S. 221, 45 S.Ct. 69, 69 L.Ed. 256.

[3] The pertinent portions of Section 2 of the Administrative Procedure Act, read as follows: "(a) *Agency*. 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944."

partment, therefore, is not exempted from the provisions of the statute, except in respect to naval authority exercised in the field in time of war or in occupied territory, and in respect to courts-martial. All other activities of the Navy Department, including the one involved in this case, are within the scope of the Act.

[2] Judicial review of administrative action is governed by Section 10 of the Act.[4] Two classes of actions are excepted from the right of judicial review: first, those as to which statutes preclude judicial review; and, second, those as to which agency action is by law committed to agency discretion. A statute precluding judicial review may be one which expressly provides that any administrative action taken thereunder may not be re-examined and set aside by the courts. Or without expressly so asserting, it may clearly and affirmatively indicate that the action of the administrative agency is to be deemed final and conclusive for all purposes. For example, some of the statutes relating to the activities of the Veterans' Administration have been so construed, Silberschein v. United States, 266 U.S. 221, 45 S.Ct. 69, 69 L.Ed. 256.

[3] In the case at bar, however, there is no such indication. On the contrary, the opposite inference is warranted. The first proviso of the statute governing the payment of the allowance provides that the determination by the Secretary of the Navy of the fact that there is no widow shall be final and conclusive *upon the accounting officers of the Government*. The obvious meaning of this limitation is that the rulings of the Secretary of the Navy in such matters are not reviewable by the Comptroller General. Expressio unius est exclusio alterius. On the basis of this canon of statutory construction, this provision should be interpreted as meaning that the determination of the Secretary of the Navy shall be final and conclusive on the Comptroller General of the United States, but on no one else. The conclusion irresistibly follows that the statute in question does not preclude judicial review.

[4, 5] The second exception comprizes agency action which is by law committed to agency discretion. Among many illustrations of such actions are the making of contracts, the making of loans by lending agencies of the Government, the issuance of passports and visas by the Department of State, the issuance of visitors' permits by the Immigration and Naturalization Service, and countless other matters in which the agency is permitted by law to reach a conclusion on the basis of its own judgment and discretion. Obviously, the action involved in the instant case is not within the realm of administrative discretion, as the

[4] The pertinent portions of Section 10 of the Administrative Procedure Act are as follows:

"Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"(a) *Rights of review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) *Form and venue of action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) *Reviewable acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

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statute creates a legal duty on the part of the Paymaster General of the Navy to pay the prescribed allowance on the occurrence of the specified contingency. It follows, hence, that the ruling involved in the instant case is not within the excepted categories in respect to judicial review.

[6, 7] Subsection (a), § 10, confers the right to secure a judicial review on any person adversely affected or aggrieved by any agency action within the meaning of any relevant statute. The effect of this provision is, on the one hand, to exclude from the right of judicial review all Governmental action affecting the public generally, but not impinging on the legal rights of any individual;[5] and, on the other hand, to permit an appeal to the courts by any person whose individual legal rights are adversely affected. Obviously, the plaintiff is aggrieved by the defendant's denial of her claim to a widow's gratuity and, therefore, is accorded the privilege of a resort to the courts.

[8] Subsection (c) provides that every agency action made reviewable by statute and *every final agency action for which there is no other adequate remedy* in any court shall be subject to judicial review.

The conclusion is inescapable that under the Administrative Procedure Act every final agency action is subject to judicial review at the behest of any person whose legal rights are adversely affected, unless the action is taken under a statute precluding judicial review, or unless the agency action is by law committed to agency discretion.

[9] In this connection, it is desirable to consider subsection (b) of Section 10, which provides that the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or in the absence or inadequacy thereof, any *applicable* form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. In other words, if there is provided an adequate specified statutory review proceeding in respect to any specified agency action, this form of proceeding should be pursued. In the absence or inadequacy of any such proceeding, recourse may be had to any applicable form of legal action. By the word "applicable" is meant "appropriate or suitable." Consequently, the aggrieved party may invoke any suitable or appropriate form of proceeding or remedy.

Thus the Standard Dictionary defines the word "applicable" as follows: "Applicable, capable of being applied; suitable or fit for application; relevant, fitting." Webster's Dictionary contains the following definition: "Capable of being applied; fit; suitable; pertinent." Black's Law Dictionary, 3d Ed., p. 125, defines the term as follows: "Applicable, fit, suitable, pertinent, or appropriate." The word "applicable", therefore, is not a term of limitation but of description.

[10] The reports of the Committees on the Judiciary of the Senate and House of Representatives, concerning this legislation clearly indicate that the foregoing conclusions are in accord with the legislative intent. Thus the Report of the Senate Committee on the Judiciary (S. Rept. No. 752, 79th Congress) submitted by Senator McCarran, states that the legislation "sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong". This Report in discussing Section 10(a) makes the following observation:

"Any person suffering legal wrong because of any agency action, or adversely affected within the meaning of any statute, is entitled to judicial review.

"This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute."

The Report contains the following comment in respect to Section 10(c):—"Agency

[5] E.g. a taxpayer may not sue to enjoin unlawful expenditure of public funds, Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078; a power company may not secure an injunction against the making of a grant or loan to a Governmental unit maintaining a competing plant, Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374.

action made reviewable specially by statute or final agency action for which there is no other adequate judicial remedy is subject to judicial review."

A similar statement is found in the Report of the House Committee on the Judiciary (H.Rept.No. 1980, 79th Cong.2d Sess.).

The foregoing analysis irresistibly leads to the conclusion that every final agency action which is not in the realm of discretion, or in respect to which no statute precludes judicial review, and which adversely affects the legal rights of any person, is subject to judicial review under the Administrative Procedure Act. The form of review is any suitable or appropriate proceeding, unless an adequate remedy is otherwise provided by a special statute. A review may, for example, be had by an action for a declaratory judgment, by an action for a restraining or mandatory injunction, by a petition for a writ of habeas corpus, or some other fitting remedy. This result necessarily subjects to judicial review a large group of administrative actions which previously could not have been re-examined or set aside by the courts. This category includes numerous determinations of private rights, in respect to which a writ of mandamus did not lie, because they involved functions that were not purely ministerial, but required a decision on questions of law or questions of fact by the administrative agency. On the other hand, the countless diversified activities of executive and administrative agencies that are committed to their discretion or that do not impinge on private rights, remain unaffected. Consequently, this interpretation of the Act, which appears to this Court to be inescapable, will not impede or interfere with the operations of the Government. On the other hand, it will extend the right of judicial review to all persons whose private rights are adversely affected by final agency action that is not discretionary in character and in respect to which no statute bars judicial review. This result seems sound and salutary. It is in the interest of protecting and safeguarding the rights of the individual. In any event, it is clear that this is what the Congress intended to accomplish.[6]

[11] In view of the foregoing discussion, rulings of the Navy Department under the statute involved in the instant case have become subject to judicial review under the provisions of the Administrative Procedure Act.

[12] We, therefore, reach a consideration of the ruling of the Navy Department on the plaintiff's claim for a widow's allowance. Section 10(e) of the Administrative Procedure Act, which relates to the scope of judicial review, authorizes the reviewing court to decide all relevant questions of law and to set aside agency action found not to be in accordance with law. As in this case the facts are stipulated, the only question for the Court to determine is whether the Navy Department correctly applied the law to the facts.

Facts

The plaintiff married one James John Ford on October 4, 1937 in Lansdowne, Pennsylvania. Thereafter she and her husband resided in New Jersey. They were separated in November, 1944. On April 27, 1945 the plaintiff obtained a divorce in the State of Chihuahua, Republic of Mexico. Her husband filed an answer in the divorce proceeding in which he joined in the prayer for a decree of divorce. Neither party to the suit was a resident of Mexico and neither personally appeared in that country. On July 3, 1945 the plaintiff married Charles Richard Snyder, a member of the naval personnel. At the time of their marriage, both parties were

[6] The Court is not unmindful of the fact that some statements have been made to the effect that Section 10 is merely declaratory of existing law of judicial review, and does not confer jurisdiction on the courts beyond that which they already had, e. g. Olin Industries v. National Labor Relations Board, D.C.Mass., 72 F.Supp. 225. While this Court has examined many of these statements, it is unable to agree with them. On the other hand, McGranery, J., in United States v. Caruso, D.C.E.D. Pa., 72 F.Supp. 193, 196, said: "The Administrative Procedure Act may conceivably provide judicial review of the operation of these agencies where none existed before, although the Court expresses no opinion on that."

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residents of New Jersey and continued to reside in that State during their entire married life. The marriage, however, was performed in Elkton, Maryland. The husband died on March 10, 1946. At the time of his death the parties were living together.

The plaintiff filed an application as the widow of Charles Richard Snyder for an allowance under the statute heretofore mentioned. The Bureau of Naval Personnel, after an investigation, concluded that the divorce obtained by the plaintiff in Mexico from her first husband was not entitled to recognition and that, therefore, her subsequent marriage to the deceased was invalid. On this basis, the Navy Department declined to approve the plaintiff's claim for an allowance equal to six months' pay of the deceased, but paid this sum to his sister. Whether the plaintiff is entitled to the widow's allowance depends on whether her marriage to the deceased was valid or even if it was invalid, whether it is subject to a collateral attack by an administrative agency.

The parties entered into the married state by a ceremony performed by a minister. The inference is clear that they considered themselves free to marry. They lived together as husband and wife until the husband's death, and no doubt deemed themselves lawfully married. The deceased apparently never thought there was any infirmity in his marriage. He named his wife as the beneficiary of his life insurance policy under the National Life Insurance Act and also designated her as the proper recipient of a widow's allowance. He evidently went to his death without questioning or doubting the validity of his marriage.

[13] The marriage was celebrated in Maryland, although both before and after the marriage ceremony the parties were residents of the State of New Jersey. The preliminary question to be determined is whether the law of New Jersey or the law of Maryland is applicable. It is well settled that the law of the place where a marriage is celebrated governs the validity of the marriage. Loughran v. Loughran, 292 U.S. 216, 54 S.Ct. 684, 78 L.Ed. 1219; Rhodes v. Rhodes, 68 App.D.C. 313, 96 F.2d 715; United States ex rel. Modianos v. Tuttle, D.C., 12 F.2d 927; Franzen v. E. I. Du Pont De Nemours & Co., 3 Cir., 146 F.2d 837; Hitchens v. Hitchens, D.C., 47 F.Supp. 73; Fensterwald v. Burk, 129 Md. 131, 98 A. 358, 3 A.L.R. 1562; Beale, The Conflict of Laws, Vol. II, pp. 667–669; Restatement, Conflict of Laws, pp. 185–187. This doctrine applies even if the parties are domiciled in a State different from that in which the marriage is celebrated, Hitchens v. Hitchens, supra; Fensterwald v. Burk, supra. The only exception to the general principle comprizes incestuous and polygamous marriages, which are abhorrent to the general standards of morality. Consequently, in the instant case the validity of the marriage must be determined by the law of Maryland rather than by the law of New Jersey.

[14] The Code of Maryland, Article 62, Section 16, provides, in part, as follows: "The circuit court for the several counties and the superior court of Baltimore City may, upon petition of either of the parties, inquire into, hear and determine and the circuit court for the several counties and the criminal court of Baltimore, on indictment, may inquire into, hear and determine the validity of any marriage and *may declare* any marriage contrary to the table in this article, or *any second marriage, the first subsisting, null and void;* * * *."

In Harrison v. State, 22 Md. 468, 490, 85 Am.Dec. 658, the Court held that a marriage within the prohibited degrees was not void but voidable.

The statute just quoted was construed and applied in Ridgely v. Ridgely, 79 Md. 298, 29 A. 597, 25 L.R.A. 800. In that case a woman, who had resided in Maryland with her husband, went to South Dakota and obtained an absolute divorce in that State. Thereafter she returned to Maryland and contracted another marriage. Her first husband brought a suit in equity to annul the second marriage on the ground that the divorce procured in South Dakota was void and that, therefore, the wife was not competent to contract a second marriage. The court held that the second marriage might be annulled only in an action brought by one of the parties thereto. The conclusion seems to follow that under the law of Maryland, a marriage contract-

ed by a person who is not free to marry is voidable, and may be annulled only by a decree of a court rendered in an action brought by one of the parties to the marriage.

[15] Since in this instance no action to annul the marriage was ever brought by either party during the husband's lifetime, under the law of Maryland the marriage is not subject to attack collaterally. It follows, hence, that the plaintiff must be deemed to be the widow of the deceased and, as such, entitled to a widow's allowance.

[16,17] In this connection it may be observed that to brand a marriage as invalid is a solemn matter. Such an adjudication may ordinarily be made only by a court of competent jurisdiction after a trial at which all interested parties have an opportunity to be heard. It is at best questionable whether an administrative agency, such as the Veterans' Administration, the Navy Department, or the War Department, has any authority to hold a marriage invalid in an ex parte manner on the basis of its own investigation. As a matter of public policy, it does not appear appropriate that an administrative agency of the Government should delve and dig into family skeletons in an endeavor to upset a marriage openly celebrated and apparently valid on its face, and which was deemed lawful by the parties thereto in their lifetime. The Congress did not intend that the Navy Department should pursue such a course, as is evidenced by the fact that the statute expressly requires payment of the widow's allowance to be made "immediately" upon official notification of the death of the deceased. Obviously, the Congress did not intend to vest in the Navy Department any authority to make exhaustive administrative investigations for the purpose of passing on the validity of a marriage apparently valid on its face.

The Court will accordingly render judgment directing the Paymaster General of the Navy to pay to the plaintiff the statutory widow's allowance.

[18,19] The complaint prays for relief in the nature of a mandamus. This relief is inappropriate, in the view of the fact that the act required to be performed is not purely ministerial. The plaintiff is entitled, however, to whatever judgment the evidence warrants, irrespective of whether it is the precise relief prayed for in the complaint.[7]

Under Section 10(b) of the Administrative Procedure Act, any applicable (i.e. suitable) form of relief may be granted. The statute expressly suggests a mandatory injunction as a possible form of relief. Accordingly, the judgment will take the form of a mandatory injunction directing the necessary payment. It is sufficient that the Paymaster General of the Navy be the sole defendant, as in the light of the decision of the Supreme Court in Williams v. Fanning, 68 S.Ct. 188, the Secretary of the Navy is not an indispensable party.

Judgment for the plaintiff granting a mandatory injunction directing the defendant to pay to the plaintiff an amount equal to six months' pay at the rate received by the deceased at the time of his death.

Submit proposed findings and conclusions of law and proposed form of judgment.

7 Rule 54(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A following section 723c

WEST KEY NUMBER SYSTEM

DU BOIS v. CAMDEN FIRE INS. ASS'N et al.

Civ. A. No. 8726.

District Court, E. D. New York.

Feb. 19, 1948.

1. Federal civil procedure ⇐1132, 2501

Defenses in action on four fire policies asserting that insured willfully concealed from insurers fact that he had suffered prior losses and had collected insurance thereon, and that insured owed duty of disclosure of such matters to insurers, stated facts as to which insurers should be permitted to go to trial as against motion

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2. Insurance ⇐62

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Administrative agencies looked behind "marital status" to determine if properly entitled to benefits

*(Shepardized & still good law)

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Visual inspection of the sample of the carton which defendant says it made for the plaintiff as compared to the carton made by defendant for others, leaves this court so much in doubt as to the plaintiffs' ability to demonstrate infringement at final hearing, that the granting of a preliminary injunction would not be justified.

The plaintiffs' patent has not been adjudicated, nor is it shown to have been acquiesced in, thus resembling the situation revealed in Stewart Stamping Corp. v. Westchester, etc., D.C., 119 F. Supp. 92 in which such a motion was denied.

[2] In reply to a counterclaim seeking a declaratory judgment of invalidity, the plaintiff urges that the defendant is its licensee, by virtue of the original order, and is thus estopped to deny validity.

Whether the plaintiffs ever did more than supply specifications for the product they desired the defendant to make and sell to them, by using the language quoted below in their letter of May 19, 1953, is too searching an issue to be decided on this motion:

> "You are hereby authorized to manufacture this order under our Patent No. 2 637 481. Please submit prices at your earliest convenience as we want delivery on or before September 1, 1953."

The parties were not strangers when this letter was written, for according to the Adams first affidavit, the parties had been doing business since 1942; hence it was natural for the Adams enterprise to ask the defendant to submit a bid based upon certain specific requirements.

The plaintiff has not cited any decision holding that under like circumstances a defendant in such a cause is estopped to assert the alleged invalidity of the patent relied upon to sustain a cause of alleged infringement.

As a matter of what is thought to be reasonably informed discretion, the motion for a temporary injunction is denied as to the purely patent aspect of the case.

[3] The issue as to unfair competition will necessarily depend very considerably upon the question of the precise relationship entered into between the parties by virtue of the placing of the original order, and the course of their dealings down to the time of the filing of this suit. That again can be resolved only in the light of the testimony at final hearing.

Motion denied. Settle order.

UNITED STATES of America, Plaintiff,

v.

Maynard R. ROBBINS and Lillian Robbins, Defendants.

No. 55-C-190.

United States District Court
E. D. Wisconsin.
May 15, 1957.

Action by government against alleged husband and wife to recover dependency payments erroneously paid to the wife under the Servicemen's Dependents Allowance Act. The District Court, Grubb, J., held that under provisions of Servicemen's Dependents Allowance Act that determination by Secretary of War of issue of dependency is conclusive and not subject to review in any court, since action was based on administrative determination that purported wife was not lawful wife in that purported marriage had taken place before purported husband's divorce had become final, court could not pass upon defendants' claims that they were husband and wife by virtue of subsequent common-law marriage.

Judgment for plaintiff.

Armed Services ⇐50

Under provisions of Servicemen's Dependents Allowance Act that determination by Secretary of War of issue of dependency is conclusive and not subject to review in any court, in government's action against alleged husband and wife to recover dependency payments allegedly erroneously paid to wife, based on administrative determination that she was not lawful wife in that purported marriage had taken place before purported husband's divorce had become final, court could not pass upon defendants' claims that they were husband and wife by virture of subsequent common-law marriage. Servicemen's Dependents Allowance Act of 1942, §§ 111, 112, 56 Stat. 384.

Edward G. Minor, U. S. Atty., by Matthew M. Corry, Asst. U. S. Atty., Milwaukee, Wis., for plaintiff.

K. Thomas Savage, Kenosha, Wis., for defendants.

GRUBB, District Judge.

During the Second World War the plaintiff paid monthly allotments to the defendant, Lillian Robbins, as the wife of a soldier-husband. This is an action for the recovery of dependency payments which it is alleged were erroneously paid to Lillian Robbins. The evidence submitted in the trial before the court showed that Maynard Robbins was divorced in Wisconsin from his first wife on April 4, 1942; that on September 1, 1942, Maynard and Lillian Robbins went through a marriage ceremony in Indiana notwithstanding the fact that under Wisconsin law Maynard Robbins' divorce was not final until the expiration of one year from April 4, 1942; that in January 1943 Maynard Robbins was inducted into the army; that during that month he applied for and was granted an allotment for his wife, Lillian Robbins; that from February 11, 1943, until May 1, 1943, Maynard Robbins was stationed in Texas and thereafter was stationed in Nebraska; that Lillian Robbins joined Maynard Robbins in Texas for about three weeks and then followed him to Nebraska; that the allotment was stopped on March 31, 1945, on grounds that Lillian Robbins was not the lawful wife of Maynard Robbins.

The defendants counterclaimed for allotment payments allegedly due to them from March 31, 1945, until Maynard Robbins' discharge in November 1945. The court dismissed the counterclaim at the beginning of the trial becaue it is barred by a statute of limitations, 28 U.S.C.A. § 2401.

It is the claim of the defendants that they are husband and wife and should not be compelled to repay the amount of the allotments paid. It is their contention that even if their Indiana marriage should not be valid, that their three weeks together in Texas established a common law marriage.

The Servicemen's Dependents Allowance Act of 1942, 56 U.S.Stats. at Large, page 381, provides as follows:

"Sec. 111. This title shall be administered by the Secretary of War in its application to enlisted men of the Army of the United States and the dependents of such enlisted men * * *."

"Sec. 112. The determination of all facts, including the fact of dependency, which it shall be necessary to determine in the administration of this title shall be made by the Secretary of the department concerned and *such determination shall be final and conclusive for all purposes and shall not be subject to review in any court* or by any accounting officer of the Government. The Secretary of the department concerned may at any time on the basis of new evidence or for other good cause reconsider or modify any such determination, and may waive the recovery of any money erroneously paid under this title whenever he finds that such recovery would be against equity and good conscience. * * *" (Emphasis supplied.)

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The wording of the act makes it abundantly clear that the fact of dependency or non-dependency is one which can be made only by the Secretary of the department concerned. Such finding of fact is conclusive "for all purposes" and is not subject to review by the courts.

In this case, it was determined that Lillian Robbins was not a dependent of Maynard Robbins under the terms of the Servicemen's Dependents Allowance Act of 1942. That finding may not be disturbed by this court. For that reason, it is unnecessary for this court to determine whether or not the defendants were validly married in Texas. Judgment must be rendered for the plaintiff.

It is not disputed that the amount of the allotments erroneously paid is $1,147.67. The defendants are liable for the amount of the allotments heretofore stated with interest from March 31, 1945, until paid and for the costs and disbursements of this action.

This opinion will stand as the findings of fact and conclusions of law in this case. Counsel for the plaintiff is directed to draft a judgment to be submitted to defendants' counsel for approval as to form only.

Priscilla M. FRIERSON, Plaintiff,
v.
Anne (Mrs. John L.) McINTYRE, Defendant.
Civ. A. No. 290.

United States District Court
W. D. Virginia, Lynchburg Division.
May 1, 1953.

Action by wife for alienation of husband's affections and alleged criminal conversation. The United States District Court for the Western District of Virginia, Barksdale, District Judge, held that defendant's motion for new trial was timely; that evidence did not justify an award of punitive damages; and that it was not within the court's province to set aside the verdict of the jury for plaintiff because of inconsistencies and contradictions in testimony.

Order entered overruling the motions of both plaintiff and defendant for new trial.

1. Federal Civil Procedure ⇐2366

Where certificate upon defendant's motion for new trial showed that it was served by mailing on April 18 which was the tenth day after judgment, and was received by the deputy clerk on Sunday, April 19th, service was within the 10 days allowed by the Federal Rule 59–b and the filing in clerk's office was "within a reasonable time after service upon opposing party" within Federal Rule 5–d. Fed.Rules Civ.Proc. rules 5(b, d), 59(b), 28 U.S.C.A.

2. Federal Civil Procedure ⇐1414

Refusing to permit plaintiff to introduce in evidence, a deposition of defendant, in which she claimed privilege against self-incrimination and refused to testify on that ground was not error, where there was nothing of probative value in the deposition, and sole purpose of plaintiff, was to seek to create prejudice against the defendant, and there was no contention that defendant was not within her rights, in claiming privilege.

3. Husband and Wife ⇐333(9)

In wife's action for alienation of husband's affections, evidence was insufficient to justify an award of punitive damages.

4. Evidence ⇐359(1)

In wife's action for alienation of husband's affections, admission of a newspaper picture of defendant and her husband was not error.

5. Federal Civil Procedure ⇐2353

In wife's action for alienation of husband's affections, newly discovered

a study of the German patent documents and not on any alleged observation of the assembly itself, so that they were obviously meant to be statements of opinion, in the technical sense of the word, and not statements of fact.

The defendant's fifth point is not persuasive.

[13] Finally, defendant takes the position that plaintiff is guilty of unclean hands with respect to his conduct regarding a certain patentee named R≠der. The defendant contends that on January, 3, 1939, Harlowe Hardinge stated under oath in the application which became patent No. 2,235,928 that "'* * * he verily believes himself to be the original, first and (2) sole inventor of the improvements in Apparatus And Method For Controlling Grinding Device described and claimed in the annexed specifications * * *'",[14] whereas in fact Hardinge knew as early as July 8, 1938, that on May 18, 1936, one Carl R≠der had filed a patent application in Great Britain for a sonic control for grinding and crushing mills. The defendant advances several arguments, which we need not specifically list, all of which defendant urges tend to support its contention that Hardinge did not believe that his invention predated that of R≠der.

The plaintiff raises a genuine issue of material fact on this point by the affidavit of Harlowe Hardinge, dated May 14, 1958, wherein under ¶ 8 at page 3 the affiant states:

> "To the best of affiant's knowledge and recollection, based upon the records available to him, the first reduction to practice of a workable device was during the Winter of 1935–1936."

This date clearly predates that of the R≠der patent and counsel for the defendant during the argument admitted that if that date were true then its motion must fail.[15] The defendant, however, points to the fact that in answer to interrogatories, Mr. Hardinge stated that the first reduction to practice was in October, 1936. We cannot resolve issues of credibility on a motion for summary judgment.

The defendant's motion is denied. An appropriate order will be entered.

14. Defendant's "Brief in Support of Motion Under Rule 56(b)", p. 24.

15. Transcript, May 19, 1958, p. 16.

WEST KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff,

v.

Leroy ROBSON, Frances J. Robson, Defendants.

Civ. No. 33395.

United States District Court
N. D. Ohio, E. D.
July 8, 1958.

Action by United States against recipient of family allowance to recover money so paid. Defendants moved to dismiss case. The United States District Court for the Northern District of Ohio, Eastern Division, Jones, Chief Judge, held that determination of Secretary of War that recipient of family allowance as wife of soldier was not entitled to receive such allowance furnished proper basis for suit to recover such allowance as mistakenly or wrongfully paid.

Defendants' motion denied, and judgment for plaintiff.

1. Armed Services ⇐59

Determination of Secretary of War that recipient of family allowance as wife of soldier was not entitled to receive such allowance furnished proper basis for suit by United States to recover such allowance as mis
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for plaintiff.

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2. Armed Services ⇐50

Determination of Secretary of War as to proper person to receive family allowance as wife of soldier was not reviewable by court. 37 U.S.C.A. § 252.

Sumner Canary, U. S. Atty., Cleveland, for plaintiff.

J. M. Savitt, Austin T. Klein, Cleveland, for defendants.

JONES, Chief Judge.

Careful consideration has been given to the matters and issues involved in the trial of this case, with the result that the court is of the opinion the Government should prevail for the reason that I think the matter is controlled by 37 U.S.C. § 212,[1] which provides:

> "The determination of all facts, including the fact of dependency, which it shall be necessary to determine in the administration of this chapter shall be made by the Secretary of the department concerned and such determination shall be final and conclusive for all purposes and shall not be subject to review in any court or by any accounting officer of the Government." 56 Stat. 384.

[1] In the transcript of the proceedings (Plaintiff's Exhibit 9) it is quite apparent that the Secretary of War fully reviewed the matter of the proper person to receive the family allowance and determined in a Discontinuance and Change Order that Elinor V. Robson was entitled to the family allowance as the wife of the soldier, Leroy Robson, and that the defendant Frances J. Robson was not at any time entitled to the family allowance as the wife of Leroy Robson, and not lawfully entitled to receive the family allowance that she did. The Secretary having made this determination, it is the opinion of the court that the Government properly may bring this action to recover the moneys so paid to Frances J. Robson on the basis of a suit by the Government to recover moneys mistakenly or wrongfully paid. The defendants, in their brief, relying upon Snyder v. Buck, D.C., 75 F. Supp. 902, urge that this court has the power to review under the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., 34 U.S.C.A. § 943. However, it is my opinion that the language of Section 212 of Title 37 U.S.C. is so definite, as well as practical, in relation to matters of this character that I would not feel satisfied to follow the argument and the reasoning of the defendants that, despite that specific language, this court has the power to review the determination of the Secretary of War in these matters.

[2] It is my view that the case of United States v. Robbins, D.C., 151 F. Supp. 3, a much later case than the Snyder case, supra, relied upon by defendants, is determinative of the question of the jurisdiction to review and furnishes ample support for a finding that the court has been denied the power to review the determination of the Secretary of War in such matters.

Defendants urge that only a court of competent jurisdiction may determine the marital status of parties and hold a marriage invalid after a full hearing thereon. However, the suit is not one to dissolve any marital ties but is only to determine whether or not the Government of the United States is entitled to recover money erroneously paid out. Defendant Frances J. Robson could not have acquired a property right in money paid to her by mistake, and to which she never was entitled. The determination of the proper person to receive the family allowance is not an annulment of any marriage or a final judicial determination of the marital status of these parties.

Accordingly, defendants' motion to dismiss the case will be denied and judgment entered for the United States for the sum prayed for, which is not in dispute.

1. Now 37 U.S.C.A. § 252.

If it would be of value to a final determination of this case, it might be proper to say that if the matter were subject to the review of this court under the facts presented and a full consideration thereof, it is the view of the court that the determination by the Secretary of War was correct and, should the court be wrong on the matter of jurisdiction, then I would find that the Government is entitled to recover for the reason that the money paid was to the wrong person and that the defendant Frances J. Robson was not at any time entitled thereto.

It is believed that the foregoing memorandum is adequate for compliance with Rule 52(a), 28 U.S.C.A.

ENCORE STORES, INC., a California Corporation, Plaintiff,

v.

The MAY DEPARTMENT STORES CO., a New York Corporation; Broadway-Hale Stores, Inc., a Delaware Corporation; Bullock's, Inc., a Delaware Corporation, Defendants.

No. 197-58-HW.

United States District Court
S. D. California,
Central Division.
July 7, 1958.

Antitrust suit. Defendants moved to dismiss various counts of the complaint, for a separate statement of claims, and for a more definite statement as to certain counts. The District Court, Yankwich, Chief Judge, held, inter alia, complaint was insufficient where no facts other than price-fixing were alleged to show effect upon commerce of any of the acts attributed to defendants, and therefore plaintiff would be required to make his statement of claims more definite.

Order in accordance with opinion.

1. Monopolies ⇐28(6.3, 6.6)

Where, in an antitrust case, the alleged monopolistic practices are not illegal per se, it is necessary that the complaint allege the manner in which the acts of the defendant injuriously affect interstate commerce or constitute acts prohibited by the antitrust laws.

2. Monopolies ⇐28(6.6, 6.9)

Complaint in antitrust suit was insufficient where no facts other than price-fixing were alleged to show the effect upon commerce of any of the acts attributed to the defendants, and therefore, plaintiff would be required to make his statement of claims more definite. Fed.Rules Civ. Proc. rule 12(e), 28 U.S.C.A.

3. Monopolies ⇐12(1)

Identical situations arising in the field of commerce may lead to identical actions by those concerned without any agreement or concert, legal or illegal.

4. Monopolies ⇐28(6.7)

In an action brought under the antitrust laws, although plaintiffs need not particularize the damage suffered from each particular act, nevertheless, defendants, in order to properly defend their actions, must know with what specifically illegal acts they are charged. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

Alvin G. Greenwald, Los Angeles, Cal., Danzansky & Dickey, Raymond Dickey, and Bernard Gordon, Washington, D. C., for plaintiff.

Lawler, Felix & Hall by J. Phillip Nevins, Los Angeles, Cal., for defendant, May Department Store.

MacFarlane, Schaefer & Haun by E. J. Caldecott, Los Angeles, Cal., for Broadway-Hale and Bullock's.

Opinion and Order on Motions as to the Defendants Broadway-Hale Stores, Inc. and Bullock's, Inc.

YANKWICH, Chief Judge.

The various motions of the defendants Broadway-Hale Stores, Inc., and Bullock's, Inc., filed on May 27, 1958, hereto-

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Dist. Court & Court of Appeals

Entitlement to Social Security benefits as widow where previous Mexican divorce (mail order) involved.

(* Have not shepardized)

statement showed a million dollars of earnings after taxes? A. It showed what they said it was going to be.

* * * * * *

"A. They would not produce the statement.

* * * * * *

"Q. Do I understand correctly that one of the objects of the meeting on March 3, 1950, was to get from the Beacon Company a certified statement of their earnings? A. The object of that meeting was to buy the Beacon Company.

"Q. Were you prepared at that time to pay for the Beacon Company? A. We were prepared to pay for the company.

"Q. Irrespective of the earnings? A. If the earnings were substantiated.

"Q. In other words, the object of the meeting was to buy the Beacon Company if there were certified statements showing earnings of a million dollars after taxes? A. That's correct.

"Q. And when the company declined to give you that statement, you then thought of the deal as a dead duck? A. We couldn't get Mr. Isenman to give us the certified statement. * * *"

[4] This testimony clearly presents a genuine issue of fact on whether or not the negotiations were merely preliminary. Louis Bandler's insistence upon certified figures verifying the statements which Pariser testified Isenman made would not prevent Blue Moon Foods, Inc. and June Dairy Products Co. from being an able, ready, and willing buyer if such insistence "* * * did not constitute a condition precedent to the existence of an agreement, but a reservation to be complied with before the agreement should be carried out, * * *." Hutchinson v. Plant, 1914, 218 Mass. 148, 154, 105 N.E. 1017, 1020. Furthermore, the testimony quoted above tends to show that the negotiations were terminated at the meeting of March 3, 1950, because the defendants did not provide the alleged buyer with figures substantiating their statements to Pariser, even though they had promised to do so. It, therefore, "* * * does not lie in the defendant's mouth to claim, in order to defeat the plaintiff's recovery, that other evidence was necessary to prove that the customer was ready, able and willing to purchase." Whitkin v. Markarian, 1921, 238 Mass. 334, 336, 337, 130 N.E. 684, 685; Seigel v. Cambridge-Wendell Realty Co., 1949, 323 Mass. 598, 83 N.E.2d 262.

The judgment of the district court is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

MAGNER v. HOBBY.
No. 221, Docket No. 22954.

United States Court of Appeals
Second Circuit.

Argued April 5, 1954.

Decided July 13, 1954.

Action by a mother and her minor daughter against the Secretary of Health, Education and Welfare for social security benefits and determination of the mother's rights to such benefits as the widow of an insured wage earner when she becomes 65 years old. From a summary judgment of the District Court for the Southern District of New York, Holtzoff, J., to compel the Federal Security Administrator to grant such benefits to plaintiffs, defendant appealed. The Court of Appeals, Chase, Chief Judge, held that defendant was not estopped from showing that a collusive mail order

divorce, granted insured's first wife by a court in Mexico, wherein neither party thereto was domiciled, was invalid under the law of New York, wherein insured was domiciled at the time of his death, thus overcoming the presumption of validity of his ceremonial marriage to plaintiff mother after such divorce, so as to preclude recovery of benefits by her as insured's widow.

Judgment reversed and cause remanded.

Swan, Circuit Judge, dissented in part.

1. Divorce ⇐373

Social Security and Public Welfare ⇐136

A collusive mail order divorce, granted wife by court in Mexico, wherein neither spouse was domiciled, was a nullity under law of New York, wherein husband was domiciled at time of his subsequent death, so as to overcome presumption of validity of his ceremonial marriage to another woman in Connecticut after granting of such divorce and negative her status as decedent's widow entitled to social security benefits as mother of decedent's minor daughter. Social Security Act Amendments of 1950, §§ 202 (g), 216(c), (h) (1), 42 U.S.C.A. §§ 402 (g), 416(c), (h) (1); Decedent Estate Law N.Y. § 83; Domestic Relations Law N.Y. § 51.

2. Divorce ⇐386(1)

The Secretary of Health, Education and Welfare was not estopped from showing invalidity, under New York law, of collusive Mexican mail order divorce granted wife from husband domiciled in New York at time of his subsequent death, to rebut presumed validity of his ceremonial marriage to another woman after such divorce and thus preclude her recovery of social security benefits as his widow. Social Security Act Amendments of 1950, §§ 202(e), 216(c), (h) (1), 42 U.S.C.A., §§ 402(e), 416(c), (h) (1); Decedent Estate Law N.Y. § 83; Domestic Relations Law N.Y. § 51.

3. Social Security and Public Welfare ⇐137

The Federal Security Administrator has authority to determine legitimacy, under New York law, of deceased wage earner's minor child by woman with whom he contracted ceremonial marriage after invalid Mexican decree granting his former wife a divorce, for purpose of making required determination under Social Security Act as to whether second wife is decedent's widow, so as to entitle daughter to benefits under such Act. Social Security Act Amendments of 1950, §§ 202(d), 216(e), (h) (1), 42 U.S.C.A. §§ 402(d), 416(e), (h) (1); Civil Practice Act N.Y., § 1135 subd. 6.

J. Edward Lumbard, U. S. Atty. for the S. D. of New York, and Elliot H. Lumbard, New York City, for appellant.

Warren W. Wells, White Plains, N. Y., Roderick B. Travis, New York City, of counsel, for appellees.

Before CHASE, Chief Judge, and SWAN and FRANK, Circuit Judges.

CHASE, Chief Judge.

The appellees are a mother and her minor child who is under the age of eighteen and who claimed, as the wife and child respectively of George H. Magner, certain insurance benefits under the Social Security Act. The claims were denied and there was a final administrative affirmance of the denial by the Appeals Council of the Social Security Administration. The appellees then brought this suit.

The first cause of action is in behalf of the child for child's monthly benefits under §§ 202(d) and 216(e) of the Act, Sections 402(d) and 416(e) of Title 42 U.S.C.A.[1] The second cause of action is for monthly benefits, for the mother of

1. References to the statute are to the sections as renumbered following the Social Security Act Amendments of 1950 since those amendments made no changes which affect the issues now presented.

the child in her care, under § 202(g) of the Act, § 402(g) of Title 42 U.S.C.A.; and for a determination that when the mother, some years hence, becomes 65 years old she will be entitled to a widow's benefits under §§ 202(e) and 216(c) of the Act, Sections 402(e) and 416(c) of Title 42 U.S.C.A.

The pertinent facts are not disputed. George H. Magner was an insured wage-earner under the Act when he died on April 28, 1950. He was lawfully married to Louise W. Henke in 1911 and an adult child by that wife is living. The plaintiff mother was in 1922 lawfully married to Hubert W. Henke, a brother of Louise W. Henke. In 1934, while both couples were living in Mount Vernon, N. Y., they agreed among themselves that each wife would endeavor to obtain a Mexican divorce so that Mr. Magner and Mrs. Henke could get married. It was left to Mr. Magner to make arrangements to obtain such divorces at his own expense. On May, 22, 1934, he wrote to a Mexican lawyer at Juarez, Chihuahua, Mexico, who undertook to obtain both divorces for a stated fee. The lawyer sent papers to the parties in New York, including confessions of jurisdiction by the husbands, which were signed and returned to him. None of the parties established a residence in Mexico, none even went to Mexico. The lawyer obtained a divorce decree as of June 26, 1934, for each wife in a court at Juarez and sent them to the parties in New York. On June 30, 1934, Mr. Magner and Mrs. Henke, obtained a marriage license in Greenwich, Conn., and were married there by a Justice of the Peace on July 7, 1934, while his first wife was still living.

Thereafter they continued to reside in New York, living together as man and wife until Mr. Magner died. The appellee Carol Ann Magner, their child born on November 26, 1936, is now in the care of her mother who has been living in Rye, N. Y., since Mr. Magner died.

Mr. Magner made monthly payments to his first wife after the Mexican divorce and also to the son by her who survives him, the payments to the son having at first been made when he was a minor and having been continued for a time after he became of age.

[1] We shall first deal with the claim of Alberta under § 202(g) as the mother of the child. The sole question raised as to that claim is whether she is a widow of the deceased as that term is defined in § 216(c) of the Act, 416(c) of Title 42 U.S.C.A., and as to that the only disputed point is whether a determination of family status pursuant to § 216(h) (1) of the Act, § 416(h) (1) of Title 42 U.S.C.A. shows her to be a widow. This section, insofar as now pertinent, provides that, in determining whether an applicant is a widow under the statute, the Administrator shall apply such law as would be applied by the courts of the state in which the insured individual was domiciled at the time of his death in determining the devolution of intestate personal property. As Mr. Magner was domiciled in New York when he died, the New York law is that to be applied by the Administrator in determining whether this appellee would be held by the New York courts to be a person entitled to inherit personal property as his widow. Sherman v. Federal Security Agency, 3 Cir., 166 F.2d 451. In New York personal property descends by intestate succession only to relatives of the decedent by blood or marriage. Section 83 of the New York Decedent's Estate Law, McK. Consol.Laws, c. 13; Matter of Lingren, 293 N.Y. 18, 55 N.E.2d 849, 153 A.L.R. 936. Thus, questions of estoppel aside, this appellee is entitled to the status of a widow under the Social Security Act only if the New York courts would recognize her as a person who was lawfully married to the decedent when he died.

Since Mr. Magner was lawfully married to his first wife, who was living at the time of his ceremonial marriage in Connecticut to the appellee, the decisive question is whether the Mexican divorce would be recognized by the New York courts as a dissolution of his valid first marriage that left him free to contract

the second. As this divorce was granted by a court in a foreign country there is no constitutional requirement that it be given the full faith and credit which should in one state be given to the judgment of a court of a sister state. It clearly appears that neither party to the divorce was domiciled in Mexico and the arrangements the parties made to obtain it were collusive and contrary to the public policy of New York in respect to the dissolution of marriages. Section 51 of the New York Domestic Relations Law, McK. Consol.Laws, c. 14. Harris v. Harris, 287 N.Y. 444; 40 N.E.2d 245; Murthey v. Murthey, 287 N.Y. 740, 39 N.E. 2d 941. We think it would be held by the New York courts to be a nullity. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60; Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423; Vose v. Vose, 280 N.Y. 779, 21 N.E.2d 616. Thus the first marriage of Mr. Magner was in full force and effect when he contracted the ceremonial marriage with the appellee in Connecticut and any presumption which might otherwise be indulged as to the validity of that marriage was overcome.

[2] We do not understand that the appellee disputes the invalidity in New York of the marriage in Connecticut but instead she relies on a theory of estoppel which would prevent an attack upon the presumed validity of the ceremonial marriage by proof of the invalidity of the Mexican divorce and the consequent continuation of the previous lawful marriage of the decedent to his first wife. That theory is as follows: This suit involving only the rights to social security benefits, only property rights growing out of the appellee's marriage to the decedent are in issue; and in New York a principle of divisible marriage is given effect under a theory of quasi-estoppel which would preclude reliance upon the invalidity of the Mexican divorce to invalidate the Connecticut marriage. For such a proposition, the appellee relies on Krause v. Krause, 282 N.Y. 355, 26 N.E. 2d 290, 292. In that case the wife sued the husband in an action for separate maintenance and one of the defenses interposed by him was the invalidity of the marriage because of his incapacity to contract it. He had been previously lawfully married and had been granted a divorce by a Nevada court which he sought to show was invalid as a step in showing that the subsequent marriage to the plaintiff was invalid. In holding that he was estopped from so doing the court in the majority opinion said in part,

> "We cannot lose sight of the fact that the present defendant was himself the party who had obtained the decree of divorce which he now asserts to be invalid and repudiates in order that he may now disown any legal obligation to support the plaintiff, whom he purported to marry. To refuse to permit this defendant to escape his obligation to support plaintiff does not mean that the courts of this State recognize as valid a judgment of divorce which necessarily is assumed to be invalid in the case at bar, but only that it is not open to the defendant in these proceedings to avoid the responsibility which he voluntarily incurred.
>
> "It is conceded that the estoppel which is invoked against the present defendant is not a true estoppel as that term is ordinarily understood, although the effect is the same in the case at bar."

Three years later, however, the Krause case was distinguished in Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423, 424, where a wife who had obtained a Mexican divorce by mail, though she had no domicile in Mexico, was allowed to show in a suit for an absolute divorce from her husband that the Mexican divorce was invalid even though the defendant husband had, subsequent to the Mexican divorce, married another woman in reliance upon it. The distinction then made was, as we think, between the assertion of a private claim or demand arising out of the marriage and a declaration of what effect, if any, the divorce had upon "the question of the existing marital status" of the

parties to the marriage, though we are not entirely sure about that or clear as to just what the difference is. The appellee, at any rate, would distinguish the Querze case from the instant one on the ground that here, as in the Krause case, the issue concerns property rights only and that what she calls the "rule of divisible marriage," would estop all parties in interest from contesting her right to inherit personal property under New York law as the widow of the decedent by showing that the Mexican divorce his first wife obtained was invalid. She would extend the estoppel to his son by his first wife, on the ground that the son received payments from his father pursuant to the agreement between the spouses who were parties to the Mexican divorce, even though he was not a party to the agreement. As the government would not be a party in interest to any proceeding in the New York courts to determine the right to inherit the decedent's personal property, her position is that the invalidity of the Mexican divorce could not be shown at all in such a proceeding and her status as the widow of the decedent would then be established by the presumption of the validity of the Connecticut marriage.

We do not find it necessary to explore the somewhat complicated legal theories upon which the appellee relies because in the decision in Caldwell v. Caldwell, supra, which was after both the Krause and Querze cases were decided, the Krause case was not followed. The Caldwell case was a suit by the alleged wife for separate maintenance, as was the Krause suit, and for the custody of her child by the defendant after her purported marriage to him. He was married to another woman when the parties to the suit planned to marry and, as part of the arrangements they made for so doing, obtained a Mexican divorce of the mail order variety. The question for decision was stated in the first paragraph of the opinion as follows:

"We have presented to us the question of whether any effect may be given by our courts to a divorce obtained by mail from a court of a foreign nation at the instance of one domiciled in this State." [298 N.Y. 146, 81 N.E.2d 61.] The defendant pleaded as one defense the invalidity of the Mexican divorce he had obtained. The trial court held, relying upon the Krause case, that he could not impeach the Mexican decree. The Appellate Division affirmed for the same reason, 272 App.Div. 1025, 73 N.Y.S.2d 683. But the Court of Appeals reversed as to that and answered the question above quoted in the negative. After referring to the Krause and Querze cases, among others, it said:

"To hold that one is estopped or precluded from showing the invalidity of a 'mail order divorce' is to allow such a void decree to affect, in some measure, the marital status of residents of this State. Mexico is one of our neighboring nations but no different rule may be applied to it than to a European, African or Asiatic nation. The legal profession and, indeed, the general public now recognize the valueless character of mail order divorces. To grant such a decree even the limited operative effect in this State urged by the plaintiff would be to abandon the legal position taken in the Vose and Querze cases".

We take this to mean that the Caldwell case is in accord with the Querze decision and also that a party to the divorce is not estopped to show in New York courts the invalidity of such a divorce as is here involved both on the issue of marital status itself and on the issue of property rights which are dependent upon the existence of marital status.

Consequently, the appellee has not established her status as a widow of the deceased wage-earner and insofar as the judgment rests upon that status it was erroneous.

[3] The right, however, of Carol Ann to a child's benefits under §§ 202(d) and 216(e) is affected by another New York statute. It is § 1135 of the New York Civil Practice Act and insofar as pertinent provides as follows:

"Legitimacy of children. The following provisions govern the effect of declaring a marriage void or annulling a voidable marriage upon the legitimacy of children of the marriage:

* * * * * *

"6. If a marriage be declared a nullity or annulled upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, if it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or wife was dead or that the former marriage had been annulled or dissolved, or without any knowledge on the part of the innocent party of such former marriage, a child of such subsequent marriage is deemed the legitimate child of the parent who at the time of the marriage was competent to contract. If either or both parties to such subsequent marriage were incompetent to contract, the court by the judgment may decide that a child of the marriage is the legitimate child of such an incompetent."

The appellant has taken the position that as the legitimacy of this minor child must be determined pursuant to the law of New York, Olmsted v. Olmsted, 190 N.Y. 458, 83 N.E. 569; Restatement, Conflict of Laws, Sections 34, 137, and there has been no determination by a court of that state having jurisdiction so to do, the child must, for present purposes, be considered illegitimate. And further that the only court having jurisdiction to make such a determination is the Supreme Court of New York in an action brought pursuant to Section 67 of the Civil Practice Act. Anonymous v. Anonymous, 174 Misc. 906, 22 N.Y.S.2d 598; Matter of Crook's Estate, 140 Misc. 721, 252 N.Y.S. 373. Be that as it may for other purposes, we cannot agree that the Administrator is without authority to make the determination for the purpose of making the required determination under § 416(h) (1) of Title 42 U.S.C.A. in the fulfilment of her duty to determine benefit status under the Social Security Act. Bloch v. Ewing, D.C., 105 F.Supp. 25. Cf. Atwater v. Ewing, D.C., 86 F.Supp. 47. That duty is to apply in the absence of any determination by the New York courts, "such law as would be applied" by them "in determining the devolution of intestate personal property" of the decedent in a proper action for such a determination in the state court. In so doing the Administrator should find the facts pertinent to a decision of legitimacy under Section 1135(6) of the Civil Practice Act. As such findings have not yet been made so far as now appears, it is necessary to remand for that purpose. The critical fact is whether when the marriage in Connecticut was performed the decedent entered into it in good faith in the belief that his former marriage and that of Alberta had been lawfully dissolved by the Mexican divorces.

Her effort to secure a declaration of her right to a widow's benefits upon attaining the age of 65 years was, in any event, premature since an application for a benefit must be filed not more than three months before the first month for which the applicant becomes entitled to such benefit. Section 202(j) (2) of the Act, 42 U.S.C.A. § 402 (j) (2); Luck v. Ewing, D.C., 84 F.Supp. 525. It is, however, without merit because of her failure to establish a widow's status for the reasons above stated.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.

SWAN, Circuit Judge (dissenting in part).

I agree that the judgment must be reversed and that the plaintiff Alberta can take nothing as widow of the deceased wage-earner. But I cannot agree that the cause should be remanded for further findings by the Administrator as to the status of the child plaintiff. Since the mail-order divorces were a nullity, the child was illegitimate. Section 1135 (6) would permit her to be "deemed the legitimate child" of her father, only if an

action of the character described had been brought and the judgment therein so determined. No such action was brought; hence she continued to be an illegitimate child. I do not believe that under New York law the Administrator may exercise the jurisdiction conferred upon the state court to affect her status. Consequently, I would direct that upon remand of the cause judgment be entered for the defendant.

DODSON et al. v. UNITED STATES.
No. 12070.

United States Court of Appeals
Sixth Circuit.
Aug. 16, 1954.

Five of six defendants were convicted under one count of an indictment for conspiracy to violate the Mann Act, four of them were convicted under another such count, and three defendants were convicted of violating such Act. The District Court for the Western District of Kentucky, Shelbourne, J., rendered judgments on the jury's verdicts, and the convicted defendants appealed. The Court of Appeals, Stewart, Circuit Judge, held that the evidence warranted the convictions of two of three men defendants for one of the conspiracies charged, but was insufficient to take to the jury the questions of the third man's and two women defendants' guilt of such offense or such women's and a third woman defendant's guilt of the other conspiracy, and that the evidence supported the conviction of one of the men defendants, but not the convictions of two women defendants, for violating the Act.

Convictions affirmed in part and reversed in part, and the three women defendants ordered discharged.

1. Criminal Law ⇐1144(13)

On appeal from convictions of crimes, evidence must be considered in light most favorable to the government.

2. Conspiracy ⇐47

A criminal conspiracy may be proved by circumstantial evidence.

3. Conspiracy ⇐47

Evidence warranted conviction of two men for conspiracy to transport two women in interstate commerce for purpose of prostitution in violation of Mann Act. 18 U.S.C.A. §§ 371, 2421.

4. Criminal Law ⇐113

Proof that alleged conspiracy to transport women in interstate commerce for purpose of prostitution was formed in federal district wherein defendants were indicted and tried was unnecessary to invest district court for such district with jurisdiction of prosecution, as prosecution for conspiracy may be maintained in any federal district wherein an overt act was committed in furtherance of conspiracy. 18 U.S.C.A. §§ 371, 2421.

5. Criminal Law ⇐113

The federal District Court for district from which persons charged with conspiracy to transport women in interstate commerce for purpose of prostitution set out on their interstate journeys had jurisdiction of prosecution, and venue thereof in such district was proper. 18 U.S.C.A. §§ 371, 2421.

6. Conspiracy ⇐48

Evidence was insufficient to take to jury question of guilt of one of three men charged with conspiracy to transport women in interstate commerce for purpose of prostitution. 18 U.S.C.A. §§ 371, 2421.

7. Conspiracy ⇐48

In prosecution of three men and two women for conspiracy to transport such women in interstate commerce for purpose of prostitution, district court should have directed verdicts for women defendants, in absence of evidence supporting inference that either of them did anything more than consent to her own

cy compensation. If "institutes proceedings within the period prescribed in section 913" means third party proceedings, then there is no time limit whatever anywhere in the Act for filing a claim for deficiency compensation. Obviously the draftsmen of this statute, who provided in 33 U.S.C.A. § 913(a) for the filing of a claim within one year from the date of the injury or death, and, in 33 U.S.C.A. § 913(d),[9] for the filing of a claim within one year from the time a common law action against the employer is dismissed because the claim is covered by the Act, have not been remiss to the extent that no time limit is provided for the filing of a claim for deficiency compensation.

It must be owned that this court's interpretation of 33 U.S.C.A. § 933(f) is not free from doubt. But the Court of Appeals for the Fifth Circuit has already held that this same subsection of the Act is ambiguous in another particular and that that ambiguity had to be resolved in favor of the claimant, in keeping with the remedial and beneficent purposes of the Act.[10] So any doubt which may here exist must likewise be resolved in favor of the widow and child.[11]

Compensation order vacated and set aside.

9. 33 U.S.C.A. § 913(d) reads:
"Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter the limitation of time prescribed in subdivision (a) shall begin to run only from the date of termination of such suit."

10. In Voris v. Gulf-Tide Stevedores, 5 Cir., 211 F.2d 549, 551, the court said:
"The court below held that it was the total or gross and not the net amount of the recovery against a third party, the excess of which the employer was required to pay under 33 U.S.C.A. § 933(f), which provides, in part, for the payment of 'a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.' The facts being undisputed, the question presented below and here is one of interpretation of an ambiguous statute, which should be liberally construed in favor of longshoremen and harbor workers."

11. In Markham v. Cabell, 326 U.S. 404, at page 409, 66 S.Ct. 193, at page 195, 90 L.Ed. 165, the court wrote:
"The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226, illustrates. The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

Elsie F. DWYER, Plaintiff,

v.

Marion B. FOLSOM, Secretary of the Department of Health, Education and Welfare, Defendant.

Civ. No. 15948.

United States District Court
E. D. New York.

March 29, 1956.

Action to establish plaintiff as widow of deceased wage earner, under Social Security Act. Upon plaintiff's motion for judgment on pleadings or for summary judgment, and defendant's motion for order dismissing complaint, or for summary judgment, the District Court, Bruchhausen, J., held that where status of person as widow of deceased wage earner depended on validity of Mexican divorce decree which she had obtained from first husband, and such decree was collusive, and invalid in state of domicile of decedent, person was not entitled to widow's benefits under Social Security Act.

Defendant's motion for summary judgment granted.

1. Social Security and Public Welfare ⇐147

Where person, who had been 62 years of age at time she had been denied lump sum benefits for funeral expenses of alleged husband, became 65 and of age to claim widow's monthly benefits under Social Security Act, district court would determine her claim, in action against federal administrator, though decision of federal agency had been confined to issue of equitable entitlement to reimbursement for payment of funeral expenses. Social Security Act, § 216(h) (1), 42 U.S.C.A. § 416(h) (1).

2. Social Security and Public Welfare ⇐136

In determining entitlement of person to monthly insurance benefits as alleged widow of deceased wage earner, under Social Security Act, in case where validity of person's marriage to deceased depended on validity of prior Mexican divorce decree, marital status of person, including validity of divorce decree, would be determined by application of intestate law as to personal property of state wherein wage earner was domiciled at time of death. Social Security Act § 216(h) (1), 42 U.S.C.A. § 416 (h) (1).

3. Social Security and Public Welfare ⇐136

Where wage earner had been domiciled in New York at time of death, and person, claiming widow's status, applied for monthly insurance benefits under Social Security Act, marital status of claimant, including validity of prior Mexican divorce decree, would be determined by application of law of New York. Social Security Act, § 216(h) (1), 42 U.S.C.A. § 416(h) (1).

4. Divorce ⇐373

The courts of New York abhor collusive Mexican "mail order" divorces, and refuse to recognize them as having validity within their jurisdiction.

5. Divorce ⇐373
Social Security and Public Welfare ⇐136

Where wife had obtained mail order Mexican divorce decree from husband, though neither party had been personally present in Mexico, and New York, in subsequent divorce action by husband, refused to pass on validity of such decree, decree was collusive, under New York law, and wife, who subsequently remarried, pursuant to Illinois license which recited Mexican decree, could not claim status of widow of second husband, within widow benefit provisions of Social Security Act. Social Security Act, § 216(h) (1), 42 U.S.C.A. § 416(h) (1).

6. Social Security and Public Welfare ⇐136

Where status of person as widow of deceased wage earner depended on validity of Mexican divorce decree which she had obtained from first husband, and such decree was collusive, and invalid in state of domicile of decedent, person was not entitled to widow's benefits under Social Security Act. Social Security Act, § 216(h) (1), 42 U.S.C.A. § 416 (h) (1).

Delaney & Feltman, New York City, Lee Feltman, New York City, of counsel, for plaintiff.

Leonard P. Moore, U. S. Atty, Brooklyn, N. Y., Myron Friedman, Asst. U. S. Atty., Long Beach, N. Y., of counsel, for defendant.

BRUCHHAUSEN, District Judge.

The plaintiff's motion is for judgment on the pleadings, or, in the alternative, for summary judgment in her favor. The defendant, by separate motion, seeks an order dismissing the complaint upon the ground that the Court does not have jurisdiction of the subject matter herein or, in the alternative, for summary judgment in his favor.

The question involved is whether the plaintiff is the widow of Robert E. Dwyer so as to entitle her to receive monthly

insurance benefits upon reaching the age of 65 years, pursuant to the Social Security Act, 42 U.S.C.A. § 416(h) (1).

[1] The plaintiff, upon the death of the wage earner, Robert E. Dwyer, pursued the procedure prescribed by the Act for obtaining the benefits thereunder. Upon his death on July 20, 1953, she applied for lump-sum benefits for funeral expenses, claiming that she was the widow of the wage earner. She then was 62 years of age, having been born on April 22, 1891. Upon the presentation of the application, she was informed that she could not collect those expenses as the widow of the insured, within the meaning of the Act, but could lawfully claim them as the person equitably entitled thereto by reason of her having paid the funeral expenses. She appealed from the ruling but the determination was sustained by the administrative referee. The Government contends that this Court lacks jurisdiction upon the ground that there has been no determination of claimant's status as a widow for the purpose of insurance benefits since she had not attained the age of 65 years, at the time of making the application and that the decision of the Bureau and the affirmance by the referee were based solely upon her status as a claimant equitably entitled to the funeral expenses. In other words, the Government contends that no determination was made upon her status as the alleged widow of the wage earner. However, the plaintiff has now reached the age at which the statute permits her to make application for a widow's monthly benefits. It is apparent that no additional facts can be presented and that the question of her right to such benefits, as the alleged widow, may now be determined, thus avoiding further litigation.

Whether the plaintiff is the widow of the deceased wage earner, Robert E. Dwyer, depends upon the validity of the divorce decree from her first husband, Rudolph H. Weber. The claimant, plaintiff, was married to Rudolph H. Weber in New York City in 1912 and obtained a so called "mail order" divorce from him, emanating from a court in Mexico on December 28, 1928. Neither of the parties was personally present in Mexico. On January 18, 1929, about three weeks after the date of the divorce decree, the plaintiff married the wage earner, Robert E. Dwyer, in the City of Chicago. Subsequently they became domiciled in New York. Meanwhile, the plaintiff's first spouse, the said Rudolph H. Weber, brought an action against the plaintiff in the Supreme Court of the State of New York, Nassau County, for absolute divorce, wherein he alleged the invalidity of the Mexican divorce decree. In a decision in that action, Weber v. Weber, 135 Misc. 717, 238 N.Y.S. 333, the Court, sitting as a court of equity, refused to pass upon the validity of the Mexican decree. On October 2, 1929, several months after the date of the said decision, the said Rudolph H. Weber remarried. The wage earner, Robert E. Dwyer, died on July 20, 1953, without leaving issue. At that time, both he and the plaintiff were domiciled in the State of New York. The decedent bequeathed his entire estate to plaintiff.

[2, 3] The marital status of the plaintiff, including the validity of the Mexican divorce decree obtained by her must be determined by the application of the intestate law as to personal property of the State wherein the wage earner was domiciled at the time of his death. Section 416(h) (1), supra. In this case, therefore, the law of the State of New York is applicable.

[4] The courts of that State abhor collusive Mexican "mail order" divorces and refuse to recognize them as having validity within their jurisdiction. Vose v. Vose, 280 N.Y. 779, 21 N.E.2d 616; Querze v. Querze, 290 N.Y. 13, 47 N.E. 2d 423; Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60; Rosenbaum v. Rosenbaum, 309 N.Y. 371, 130 N.E.2d 902. The case of Magner v. Hobby, 2 Cir., 215 F.2d 190, is directly in point. The Court therein denied an application, similar to the one made by the plaintiff in the case at bar.

[5] The collusiveness of the plaintiff's Mexican divorce decree is demonstrated in the aforesaid decision concerning it, Weber v. Weber, supra. The adjudication therein was anything but an assurance to the plaintiff, claimant, that she was free to re-marry, under the laws of New York.

The plaintiff, claimant, maintains that at the time of the Mexican divorce decree, the State of New York had not condemned such decrees. This may be so, but the parties involved in the first decision concerning such a decree were likewise so aggrieved. Alzmann v. Maher, 231 App.Div. 139, 246 N.Y.S. 60. New York is a strict divorce State, and were it not for the Williams v. State of North Carolina decision, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, it probably would not now be recognizing decrees of many of its sister States. See Rosenbaum v. Rosenbaum, supra.

The plaintiff, claimant, maintains that licenses issued to her in Illinois to remarry, and to Mr. Weber in New York, have validated her status as the wage earner's widow, in that both of them recite the prior Mexican divorce decree.

It seems inappropriate for an administrative office, especially of another State, to act counter to the public policy the New York courts have so clearly defined. See Lefferts v. Lefferts, 263 N.Y. 131, 188 N.E. 279; Baumann v. Baumann, 250 N.Y. 382, 165 N.E. 819. The case of Drew v. Hobby, D.C.S.D.N.Y., 123 F.Supp. 245, is distinguishable in that the original husband procured the Mexican divorce decree by actually visiting Mexico and satisfying all of the jurisdictional requirements whereby New York, by comity, would give it recognition.

[6] The plaintiff, claimant, sought a divorce by a method which the courts of New York have declared a legal nullity, and now she asks that it be adjudged legally effective.

The defendant's motion for summary judgment is granted. The plaintiff's motions are denied.

UNITED STATES of America, Petitioner,

v.

Amando Sulimenario LUMANTES, Respondent.

No. 32760.

United States District Court
N. D. California, S. D.
March 28, 1955.

Denaturalization petition on ground of alien's concealment of fact that he was married. The District Court for the Northern District of California, Southern Division, Edward P. Murphy, J., held that the concealment was material.

Petition for revocation of naturalization granted.

Judgment affirmed 232 F.2d 216.

1. Aliens ⇐71(7)

False answers of applicant for naturalization, whereby he concealed fact that he was married, were material, though marital status would not have precluded naturalization, since they closed avenue of inquiry regarding his character, and hence were grounds for denaturalization. 8 U.S.C.A. § 1445.

2. Aliens ⇐71(18)

Evidence warranted revocation of naturalization on ground that alien's misrepresentation in concealing his marriage was deliberate and willful.

3. Evidence ⇐134

Witnesses ⇐336

In proceeding for revocation of naturalization on ground of false statements, evidence of alien's subsequent conviction for narcotics smuggling and details of the crime was admissible to impeach him and as evidence of similar acts showing intent and propensity to deceive government officials.

Lloyd H. Burke, U. S. Atty., James B. Schnake, Asst. U. S. Atty., San Francisco, Cal., for petitioner.